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Office of the Secretary
Federal Communications Commission
The Portals -- 445 12th Street S.W.
Washington, DC 20554

RE: New Developments Affecting The Reconsideration Decision In *Docket 99-325*

Dear FCC Commissioners, and Commission Staff:

As you know, an October 25, 2002 Petition For Reconsideration is now pending before the Commission in FCC Docket 99-325. This Docket concerns the initiation of broadcasts using In Band On Channel (IBOC) Digital Radio, on a virtually unregulated basis, as authorized by the FCC's "interim" IBOC approval Order of October 11, 2002.

As you also know, I am the attorney for the numerous parties to the referenced Petition For Reconsideration. We began with 34 Petitioners, but retroactive signatories have since brought the number of Petitioners to 40. Our Petition contends that "interim" IBOC approval should be withdrawn, or at least suspended, until and unless the FCC has:

- (a) Completed comprehensive, comparative testing and evaluation of *all* viable Digital Radio technologies, including IBOC *and* its competitors;
And
- (b) Resolved certain pending and relevant proceedings which pre-date the IBOC approval Order, including an Environmental Impact Statement (EIS) Request, 2 Petitions For Rulemaking and 1 Petition For Notice Of Inquiry.

We write to the FCC now in order to place On The Record an information update, concerning new developments which affect, *and* strengthen, the case for our Petition.

1. New Development Involving THE KAHN PETITION. On February 10, 2003, we apprised the FCC that a separate challenge to the IBOC approval Order had been filed by *Leonard R. Kahn, P.E.* of KAHN COMMUNICATIONS. That Petition, filed on January 27, 2003, was assigned to the PRMO3MB section of the FCC's Electronic Comment Filing System (ECFS). It would suspend IBOC until and unless new, generic technology evaluation standards have been developed, adopted and applied by the FCC.

Now we must update that information with a new report. On April 5, 2003, Mr. Kahn submitted an *amended* version of his earlier Petition, which we incorporate by reference. The *amended* Petition, which was also assigned to section PRM03MB of the FCC's ECFS, retains the earlier call for conditional suspension of the "interim" IBOC approval Order. However, the new Petition adds an announcement, which is echoed in a companion press release, that KAHN COMMUNICATIONS has developed *its own* new technology for Digital Radio broadcasts on the AM Band.

Mr. Kahn asserts that this new technology, which he calls COMPATIBLE AM DIGITAL (with the trademarked abbreviation CAM-D), avoids all of the interference problems which have been associated with IBOC AM broadcasts to date. He adds that the CAM-D technology is already being tested by several full power radio stations in the Midwest and the West. Not surprisingly, he formally requests, in his amended Petition For Rulemaking, that the FCC conduct a *competitive comparison* of CAM-D technology and IBOC technology, including full testing and evaluation.

We cannot endorse Mr. Kahn's technology, "sight unseen", but we certainly believe it deserves a chance to be *competitively compared* to the IBOC technology. To that end, with that caveat, we support the amended Kahn Petition.

2. *New Development Involving EMERGENCE OF A NATIONWIDE "AMBER ALERT" SYSTEM.* On January 25, 2003, we brought to the FCC's attention the new information that:

- (a) Support was rising in Congress for legislation to promote a nationwide "Amber Alert" system, to be used to increase the odds for finding kidnapped or otherwise missing children;
- And
- (b) The new, nationwide "Amber Alert" would require heavy reliance on Highway Alert Radio/Traveller Information Service (HAR/TIS) stations that transmit on the AM Band and are highly vulnerable to interference from new IBOC radio stations.

Now we must update that earlier information with a new report. Both Houses of Congress have since enacted the promised legislation to promote a new, nationwide "Amber Alert" System. The bill was signed into law by the President on April 30, 2003, in a well-televised Rose Garden Ceremony for which he flew in Elizabeth Smart.

The prospect of interference with the new, nationwide "Amber Alert" System should be enough, in and of itself, to justify -- and motivate -- the Commission's Reconsideration of its "interim" approval of IBOC.

3. *The Commission's Acknowledgement Of A Need For Greater Awareness Of ENVIRONMENTAL IMPACT STATEMENT Requirements.* On May 1, 2003, FCC Chairman Michael Powell announced with a flourish a new "Environmental and Historic Preservation Agenda" for the Commission.

One stated goal on this Agenda is to "enhance our expertise in environmental and historic [preservation] matters". NEPA, the National Environmental Protection Act of 1969, is one of 3 federal statutes that are mentioned by name. This statute contains the sweeping requirement that each federal agency must prepare an EIS *whenever* it is *considering* "a major federal action" -- such as mandating nationwide conversions from Analog Radio to IBOC Digital Radio -- which could affect the natural and/or human environment.

We commend the FCC for publicly, and officially, setting "increased expertise" on environmental protection statutes, including statutory EIS requirements, as a goal. Still, the setting of this goal on May 1, 2003 implicitly acknowledges that the FCC's expertise on environmental statutes may have been less than adequate on July 18, 2002, when the FCC received a multi-party Request for an EIS in Docket 99-325, submitted by several parties who later joined in the Petition For Reconsideration -- and also on October 11, 2002, when the FCC rolled a cursory acknowledgement and dismissal of this multi-party EIS Request into a lengthy Order approving "interim" IBOC broadcasts.

Our grounds for objecting to this casual disregard of the EIS Request have included:

- (a) The FCC's failure to solicit public comments on the EIS Request;
 - (b) The FCC's decision to dismiss the EIS Request without first conducting an Environmental Assessment of prospective IBOC implementation;
- And
- (c) The fact that the FCC's October 11 statement of reasons for dismissing the EIS Request did not address all, or even a majority, of the environmental concerns and legal requirements that had been raised in the EIS Request.

In summary, we are noting, and emphasizing, the emergence of 3 new developments:

- 1. The Kahn Petition For Rulemaking, as filed in January of 2003 and amended in April of 2003;
 - 2. The signing of national "Amber Alert" legislation into law in April of 2003;
- And
- 3. The FCC's acknowledgement, in May of 2003, that it needs to improve its knowledge of environmental protection mandates, explicitly including those of NEPA -- which implies in turn an admission that its earlier disregard of an EIS Request for prospective IBOC implementation may have been flawed.

These 3 new developments do not constitute the *total* volume of relevant new information which has come before the Commission since our October 25 Petition was filed. Other new information has included:

4. The mounting reports of IBOC interference with radio stations “in the real world”;
5. THE NATIONAL TRANSLATOR ASSOCIATION’S February 12, 2003 call, in FCC Docket RM-10609, for action to protect FM translators from IBOC;
- And
6. The emergence of public opposition to IBOC, On The Record in this Docket, by several different broadcast engineers.

All of this new information has been brought to the Commission’s attention, and placed On The Record in this Docket, by filings which the Petitioners, and/or other parties, have made since October 25.

At this point, with the evidence of IBOC-related problems rising just as the new CAM-D Digital Radio technology has arrived on the scene for evaluation, it should be increasingly apparent to the Commission that its “blank check”, non-competitive approval of IBOC needs to be -- and, sooner or later, *will have to be* -- re-thought. The real question before the Commission is, therefore, whether to begin the process of IBOC suspension and reconsideration *now*, while IBOC stations are still relatively few in number and the need to undo damage is still relatively limited, or *later*, when more investments may have been made in IBOC technology, damage mitigation or reversal may have become much more complicated *and* valuable Commission resources may have been expended on time-consuming battles in Congress and/or the courts.

We urge the Commission to suspend and re-consider IBOC authorization *NOW*, before the task of “mid-course correction” becomes any more complex or demanding. Our Petition For Reconsideration provides a vehicle for acting sooner rather than later.

Respectfully submitted,

Don Schellhardt, Esquire

Representing The 40 Parties To The October 25 Anti-IBOC Petition For Reconsideration